MOTION FILED
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No. 96-79

In the Supreme Court of the United States

October Term, 1996

SANDRA JEAN DALE BOGGS,

Petitioner,

vs.

THOMAS F. BOGGS, HARRY M. BOGGS, and DAVID B. BOGGS,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS AND BRIEF OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT E. TEMMERMAN, JR.*
Vice Chair, Executive Committee
Estate Planning, Trust and Probate Law Section
State Bar of California

1550 S. Bascom Avenue, Suite 240
Campbell, CA 95008-0638
Telephone: (408) 377-1788

* Counsel of Record

AMICUS CURIAE BRIEF ADVISORS

Keith P. Bartel, Esq.
Edward V. Brennan, Esq.
Randolph B. Godshall, Esq.
Michael J. Jones, C.P.A.
Marita K. Marshall, Esq.
Terence S. Nunan, Esq.
Betty J. Orvell, Esq.

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

The Estate Planning, Trust and Probate Law Section of the State Bar of California respectfully requests leave to file an *amicus curiae* brief in support of the position of the Respondents. The Petitioner has withheld consent to the filing of this brief. Notwithstanding Petitioner's withholding of consent to the filing of this *amicus curiae* brief, the Respondents have generously consented to the filing of no less than two *amicus curiae* briefs in support of the Petitioner.[1]

The Supreme Court's decision in the case of *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 397 (U.S., Nov. 1, 1996) (No. 96-79), will affect millions of United States citizens of all economic circumstances. The Court must weigh the doctrine of federal preemption against traditional state law rights in order to reconcile the conflict between the Fifth Circuit Court opinion in *Boggs, supra* and the Ninth Circuit Court opinion in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991). The issues involved have been debated and closely followed by estate planning lawyers, pension plan administrators, legal commentators, the Department of Labor, and numerous state legislatures.

It is estimated that the almost 80 million residents in the nine community property jurisdictions have as much as one trillion dollars in qualified retirement plans.[2] The Supreme Court's decision in the *Boggs* case will directly and profoundly affect those residents' lifetime and testamentary rights in those dollars. California is the largest community property jurisdiction and the most populous state in the nation. For a

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[1] Respondents gave written consent to Employers Council on Flexible Compensation and to the American Association of Retired Persons (AARP) to file *amicus curiae* briefs in support of Petitioner. Both written consents have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3.

[2] To arrive at this estimate, U.S. private pension assets as of 1991 have been allocated according to population by state. Source: Employee Benefits Research Institute and 1990 U.S. census.

married couple in California, a retirement plan benefit is often the single largest asset of their estate.

The Estate Planning, Trust and Probate Law Section of the State Bar of California (the "Section") is one of many volunteer sections of a Bar representing over 120,000 lawyers. The Section consists of approximately 5,700 lawyers who practice in the estate planning field and who are advisors for over 30 million California residents on their rights and options for disposition of their retirement plan benefits.

After this Court granted certiorari in *Boggs*, the Executive Committee of the Section voted unanimously to seek, and subsequently obtained, approval of the State Bar of California Board of Governors to file an *amicus curiae* brief with the Supreme Court. Such approval is rarely granted. The critical importance of this issue to California residents persuaded the Board to grant approval.

Members of the Section must be able to properly advise their clients, with confidence and clarity, as to what testamentary rights California spouses have in retirement plan benefits. The disposition of plan benefits is one piece of a complex set of rules for estate planning which calls into play both state property law principles, and federal estate, income, and excise tax rules.

The interplay between state community property law principles and ERISA is exceedingly complex, particularly with respect to the rights of a nonparticipant spouse who predeceases the participant spouse. In *Ablamis, supra* at 1468, the Ninth Circuit, in a 2-1 decision, held that ERISA, as amended by the Retirement Equity Act of 1984 ("REA"), preempts the application of California community property law principles that would otherwise have recognized the predeceased nonparticipant spouse's testamentary control over her half of the retirement plan assets.

The *Ablamis* decision generated considerable controversy in the estate planning field. In *Boggs*, *supra* at 97-98, the Fifth Circuit, in a 2-1 decision, sided with opponents of the *Ablamis* decision and held that ERISA does not preempt the Louisiana state law community property rights of a nonparticipant spouse, including her right to exercise testamentary control over her share of the participant spouse's retirement

plan assets.

The Section supports the Fifth Circuit's position and believes that the Ninth Circuit's *Ablamis* decision is flawed. The majority opinion in *Ablamis* misapplied existing legal precedent (including decisions of the Court) in concluding that the REA amendments to ERISA reversed the well-established principle that ERISA did not preempt state law community property rights. See, e.g., *In re Marriage of Campa*, 89 Cal. App. 3d 113 (1979), *appeal dismissed for want of a substantial federal question, Carpenters Pension Tr. Fund for N. Cal. v. Campa*, 444 U.S. 1028 (1980); *Carpenters Pension Trust v. Kronschnabel*, 632 F. 2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

By eliminating the testamentary rights of the nonparticipant spouse in her community property share of pension benefits, the *Ablamis* majority failed to recognize the restraints on federal preemption and, in doing so, erroneously overrode the unanimous viewpoint of the three state supreme courts in community property jurisdictions that have addressed this issue. Those three state supreme courts unanimously concluded that the nonparticipant spouse can exercise testamentary control over her community property share of the participant spouse's retirement benefits. See *Allard v. Frech*, 31 T. Sup. J. 371, 754 S.W.2d 111 (Tex. 1988); *Farver v. Department of Retirement Sys.*, 97 Wash. 2d 344, 644 P.2d 1149, (Wash. 1982); and *Estate of MacDonald*, 81 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 (Cal. 1990).

Moreover, the *Ablamis* majority misconstrued and misapplied the legislative history behind REA in finding that Congress intended to preempt state community property laws concerning the testamentary rights of a nonparticipant spouse. Properly analyzed, the legislative history behind REA evidences that Congress, at best, intended to enhance the rights of surviving nonparticipant spouses (in both common law and community property jurisdictions) and, at worst, failed to consider, let alone address, the existing testamentary rights of the predeceased nonparticipant spouse in community property jurisdictions.

The Section recognizes that a decision either affirming or reversing the *Boggs* decision may result in some inequities, given the

somewhat flawed and imperfect statutory scheme resulting from the REA amendments to ERISA. Nevertheless, the Section agrees with the position urged by the dissent in *Ablamis*, which stated:

> It is not whether Congress has crafted the most perfect statute possible to meet the goal of affording employees and their spouses lifetime security, . . . but whether state marital property law fundamentally conflicts with the statute that Congress has, in fact, created.

Ablamis, supra at 1466 n. 2 (Fletcher, Circuit Judge, dissenting). The Section likewise agrees with Circuit Judge Fletcher's conclusion that no such fundamental conflict exists and that the current statute "cannot be read as creating the testamentary disenfranchisement of a predeceasing spouse." Id. at 1467 n. 2.

Because the Supreme Court's decision in the *Boggs* case will affect millions of Californians, the Section seeks leave to file the attached *amicus curiae* brief to assist the Court in understanding the community property law principles that govern California residents. The Section is vitally interested in the outcome of this case and requests that the Court carefully weigh the nature and importance of state marital property rights in the context of the Petitioner's request to find all-encompassing federal preemption by ERISA and REA.

The *Boggs* case arises in the context of Louisiana community property law principles. The perspective from California, in which the *Ablamis* case was decided, to be provided by the Section's *amicus curiae* brief, will bring to the Court's attention relevant matters not addressed by the parties.

INTEREST OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA

The Estate Planning, Trust and Probate Law Section of the State Bar of California (the "Section") is one of many volunteer sections of a Bar representing over 120,000 lawyers. The Section consists of approximately 5,700 lawyers who practice in the estate planning field and who are advisors to the over 30 million California residents on their rights and options for disposition of their retirement plan benefits.

The almost 80 million residents in the nine community property jurisdictions have as much as one trillion dollars in qualified retirement plans.[3] The Supreme Court's decision in *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 397 (U.S., Nov. 1, 1996) (No. 96-79) will directly and profoundly affect those residents' lifetime and testamentary rights in those dollars. California is the largest community property jurisdiction and the most populous state in the nation. For a married couple in California, a retirement plan benefit is often the single largest asset of their estate.

After the Court granted *certiorari* in the *Boggs* decision, the Executive Committee of the Section voted unanimously to seek, and subsequently obtained, approval of the State Bar of California Board of Governors to file an *amicus curiae* brief with the Supreme Court. Such approval is rarely granted. The critical importance of this issue persuaded the Board to grant approval.

The interplay between state community law principles and ERISA is exceedingly complex, particularly with respect to the rights of a nonparticipant spouse who predeceases the participant spouse. *In Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit in a 2-1 decision, held that ERISA preempts the application of state

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[3] To arrive at this estimate, U.S. private pension assets as of 1991 have been allocated according to population by state. Source: Employee Benefits Research Institute and 1990 U.S. Census.

community property law principles that would otherwise have recognized the predeceased nonparticipant spouse's testamentary control over her half of the retirement plan assets.

The *Ablamis* decision generated considerable controversy in the estate planning field. In *Boggs, supra*, the Fifth Circuit in a 2-1 decision, held that ERISA does not preempt the state law community property rights of a nonparticipant spouse, including her right to exercise testamentary control over the participant spouse's retirement plan assets.

Because the Supreme Court's decision in the *Boggs* case will affect the economic status and property rights of millions of Californians, the Section submits this *amicus curiae* brief to assist the Court in understanding the community law principles which govern California residents. The Section requests that this fundamental system of state marital property rights be carefully weighed in the context of Petitioner's request to find all-encompassing federal preemption of community property by ERISA.

STATEMENT OF THE ISSUES

(1) Does the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1429 ("REA") preempt state community property law and preclude a nonparticipant spouse from disposing at death of his or her interest in the participant spouse's ERISA-regulated plan benefits?

(2) Is there federal preemption of testamentary dispositions of individual retirement accounts in community property states?

SUMMARY OF ARGUMENT

In light of the fundamental importance of a state's community property regime in defining the rights of its citizens, preemption of state community property law by ERISA or REA should not be inferred or implied. When ERISA was adopted in 1974, Section 514 (29 U.S.C. §

1144) preempted state laws which "relate to" federally regulated qualified plans. 29 U.S.C. § 1144(a). In the twenty-two years since ERISA's enactment, the Court and the inferior federal courts have struggled to define the extent and limits of Section 514. In a series of decisions culminating in the express denial to review *Campa*[4] for want of a substantial federal question, the Court confirmed that Section 514 in its original form did not, and was not intended to, preempt domestic relation and community property laws.

In 1984, in reaction to concerns that nonparticipant spouses were being treated unfairly by ERISA, Congress enacted REA and modified the original ERISA statute in some respects. In REA, Congress did not add a provision to the federal pension law which clearly and unequivocally preempted community property rights in the testamentary context. Congress did not articulate an intention to eliminate the testamentary rights of the nonparticipant spouse in community property jurisdictions.

Congress did enact legislation in REA which defined the manner and extent by which state law domestic relations orders could divide pension benefits. With respect to the subject of the nonparticipant spouse's testamentary rights over her or his community property share of qualified plan benefits, Congress was notably silent. It chose not (or more likely neglected) to legislate on this specific issue. Preemption of community property should not arise because Congress omitted to exercise its legislative power.

Congressional action after the enactment of REA confirms that Congress did not intend in REA to preempt the nonparticipant spouse's community property testamentary rights in plan benefits. In repealing Internal Revenue Code § 2039(c) in 1986, Congress recognized that the gross estate of a predeceased nonparticipant spouse will include the value of her community property interest in the participant spouse's pension benefits. Congress cannot have intended to tax an interest which it

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[4] *In Re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028, 100 S. Ct. 696 (1980).

earlier eliminated.

Individual retirement accounts ("IRAs") are not subject to ERISA's preemption rules. Nevertheless, Petitioner also argues that community property rights do not apply to IRAs. Petitioner bases her argument on language contained in the Internal Revenue Code section that governs IRAs.

The Internal Revenue Code provision cited by Petitioner I.R.C. § 408(g), 26 U.S.C. § 408(g), is not a sweeping preemption rule that defeats all community property rights of non-IRA-owner spouses. Rather, its purpose is to provide uniformity in calculating the appropriate IRA deduction for wage earners and the correct taxation of IRA distributions. The Internal Revenue Service has itself acknowledged that community property rights in IRAs are unaffected by the Internal Revenue Code provision. Case law also confirms this result.

ARGUMENT

I. ERISA DOES NOT PREEMPT A NONPARTICIPANT SPOUSE'S TESTAMENTARY CONTROL OVER HIS OR HER COMMUNITY PROPERTY INTEREST IN PENSION BENEFITS

A. Pre-REA U.S. Supreme Court Cases On Preemption Establish A Presumption Of Federal Non-Preemption Of State Community Property Law.

ERISA Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, codified as amended at 29 U.S.C. §§ 1001 *et seq.*, contains a specific preemption clause. 29 U.S.C. § 1144(a) states in part: ". . . the provisions of this [statute] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA] . . ." The issue here is the intended scope of this language.

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979),

the Court set forth the applicable standard of federal preemption of state family property law. The Court stated:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. [Citation omitted.] A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. [Citation omitted]
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> * * * * *
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> The approach must be practical . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition. *Id.* at 581 and 583 (Emphasis added.)

Hisquierdo can be fairly read to create, in a marital property law setting, a presumption of federal non-preemption of state laws. The party urging preemption has the burden of overcoming this presumption. Thus, to justify preemption the Court must be persuaded that (1) ERISA "positively requires by direct enactment" the preemption of a state's community property law to the extent it gives a predeceased nonparticipant spouse testamentary control over her community property portion of her spouse's pension benefits; and (2) to allow the predeceased nonparticipant spouse to exercise such testamentary control would do "major damage" to a perceived "clear and substantial" federal interest.

A number of non-ERISA related Supreme Court cases have found federal preemption of state family law principles. These cases are heavily relied on by Petitioner and the *amicus* briefs supporting her. This reliance is misplaced; these cases are readily distinguishable from this case.

In *Hisquierdo, supra*, the Court held that Railroad Retirement Act benefits could not be divided upon divorce under state community property law. As another court observed, under the Act

> Congress has 'carefully targeted' the benefits to be provided, consciously 'fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire,' and specifically limited the extent to which a divorced spouse may reach these assets.

Employees Savings Plan of Mobil Oil Corp., v. Geer, 535 F.Supp. 1052, 1056 (S.D.N.Y. 1982) quoting and summarizing *Hisquierdo, supra*, at 584-585 (Emphasis added). In light of Congress' careful targeting of benefits and specific limitation of the rights of a divorcing nonemployee spouse, the *Hisquierdo* Court concluded that a finding of non-preemption would do major damage to "clear and substantial federal interests." [5]

In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), the Court held that the Supremacy Clause of the Constitution precluded states from dividing federal military pay in state divorce proceedings. The Court reasoned that Congress explicitly characterized military retirement pay as a personal entitlement payable to the military member only.[6]

In *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49 (1981), the Court held that the Supremacy Clause prohibited the states from compromising the service member's absolute right to designate the

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[5] *Hisquierdo, supra* at 581, 590. Congress reacted to this Court's finding of preemption. It overruled *Hisquierdo* in 1983 by enacting the Railroad Retirement Solvency Act of 1983 (Pub. L. No. 98-76). This Act specifically provided that the community property division of railroad retirement benefits was not prohibited by federal law.

[6] *McCarty, supra* at 232. Congress also legislatively overruled *McCarty* by the 1983 enactment of the Uniformed Services Former Spouses' Protection Act (Title X, 96 Stat. 730, 10 U.S.C. § 1408, Pub. L. No. 97-252). The Act allows state courts to divide "disposable retired pay . . . either as property of the member or as property solely of the member and his spouse in accordance with the law of the jurisdiction of such court". 10 U.S.C. § 1408(c)(1) (Emphasis added).

beneficiary of his or her choice with respect to federally funded insurance. The Court ruled that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Ridgway, supra* at 56, citing *Wissner v. Wissner*, 338 U.S. 655, 658. (Emphasis added.)

The *Ridgway* "force and clarity" analysis had been earlier used by the Court in *Wissner v. Wissner*, 338 U.S. 655, 658, 70 S.Ct. 398, 400 (1950). In *Wissner*, the Court found that a service member's surviving spouse could not assert a community property interest in the proceeds of a National Service Life Insurance Act policy. *Wissner, supra* at 661.

None of the four cases discussed immediately above dealt with ERISA plans involving privately funded benefits. *McCarty, Ridgway* and *Wissner* dealt with the rights of federal employees to federally funded benefits pursuant to federal legislation which spoke with "force and clarity." *Hisquierdo* dealt with federally funded benefits and federal legislation which precisely targeted the federal interest to be protected and specifically articulated the rights of a divorced spouse. Even then, Congress legislatively overruled the preemptive impacts of *Hisquierdo* and *McCarty*.

In contrast to the federally funded benefit programs discussed in these cases, *Boggs* involves a privately funded benefit program which ERISA merely regulates. In ERISA plans, federal money is not at stake. In a very real sense, participants in ERISA plans use their own money (in the form of deferred compensation) to fund their retirement benefits. [7] In community property jurisdictions, that "money" is co-owned equally by the participant spouse and the nonparticipant spouse. Thus, unlike the spouses in *Hisquierdo, McCarty, Ridgway* and *Wissner*, the nonparticipant spouse in a community property state has basically used her own money to fund her share of the ERISA plan benefits. ERISA

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[7] This concept of "self-funding" is even more appropriate in the context of so-called 401(k) plans, in which an employee is given the option of having a portion of his or her wages withheld from his or her paycheck and contributed to his or her plan account, on a before-tax basis.

was enacted to protect and secure those pension benefits - not to alter fundamental property rights created by state law and respected by federal law.

Indeed, under the holdings of *Hisquierdo*, *McCarty*, *Ridgway* and *Wissner*, preemption will not be found unless ERISA contains language which demonstrates that Congress has spoken specifically and with force and clarity in requiring that a nonparticipant predeceased spouse's community property interest in her spouse's retirement plan benefits evaporates at her death. Yet ERISA nowhere addresses, let alone "positively requires" by "direct enactment," the disposition of community property interests in a pension plan where the nonparticipant spouse dies first.

B. Pre-REA Case Law That Specifically Addressed The Community Property Rights Of The Nonparticipant Spouse Establishes That ERISA Does Not Preempt Community Property Principles.

In *In Re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028, 100 S. Ct. 696 (1980), the California court of appeals held that ERISA did not preempt community property law in the context of the division of pension rights upon divorce. The California Supreme Court denied review of the *Campa* opinion. This Court dismissed the pension plan's appeal for want of a substantial federal question. The *Campa* opinion therefore constitutes a decision on the merits.[8] *Mandel v. Bradley*, 432 U.S. 173, 97 S. Ct. 2238 (1977).

[8] As stated by the Ninth Circuit in *Carpenters Pension Trust for Southern California v. Kronschnabel*, 632 F.2d 745, 748-749 (9th Cir. 1980), "A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court's appellate jurisdiction . . . operates as a decision on the merits. . . The *Campa* appeal definitively presented the question whether ERISA preempts state court orders directing a pension plan to pay a community property share of a participant's monthly benefits to his or her ex-spouse. The Supreme Court has answered that question in the negative. We are not at liberty to disregard the Court's ruling."

The *Campa* court reached its conclusion by examining the Congressional purpose of ERISA vis-a-vis the policy and operation of California community property law. The *Campa* court held that Congress' aim in enacting ERISA did not conflict with or preempt the policy or operation of California's community property law:

> California treats pension rights, whether or not vested, as community property to the extent that they derive from employment during marriage. It does so out of a recognition of the economic importance of pension rights and the need to treat them equitably.
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> California law as applicable to the cases before us is concerned with effectuating a fair division of the monthly pension check between the former spouses. This concern plainly has no bearing on the effort of Congress, embodied in ERISA, to assure genuine pension rights. To ask a pension plan to send two monthly checks instead of one does not interfere with any of the Congressional objectives. . . . We will not lightly infer that Congress intended "radical disturbance" of "the federal-state balance" which would result from ousting state regulation of community property in the situations before us.

152 Cal. Rptr. at 368 [citations omitted] (emphasis added).

The *Campa* court also rejected the pension plan's argument that the former spouse's claim violated ERISA's anti-alienation provision found in 29 U.S.C. § 1056(d). The *Campa* court observed:

> The Fund points to ERISA's restrictions on assignment or alienation of pension benefits as evidence of Congress' concern that the pension benefits be preserved intact until an employee reaches retirement age....[These provisions] merely assure[] that the ex-wife partakes of the pension to the extent that it was earned as a result of

the community effort. Her rights are those of an owner, not a creditor.

89 Cal. App. 3d at 125 [citations omitted] (Emphasis added).

In *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom, Seafarers Union v. Stone*, 453 U.S. 922, 101 S.Ct. 3158 (1981), the divorced wife of a participant in an ERISA-regulated plan tried to enforce a state court decree which awarded her an interest in her husband's pension. The *Stone* court found no "positive requirement" of ERISA preemption by "direct enactment." It found no "major damage" to "clear and substantial" federal interests. It found no "clear and forceful" language in ERISA showing an intent by Congress to preempt community property principles. It found that California's community property laws only have a minimal "tangential relation" to ERISA. In short, the *Stone* court found California's community property laws to be within the narrow category of laws which affect employee benefit plans but which do not "relate to" them within the meaning of § 1144.

The *Campa-Stone* holdings also obtained in numerous other cases. See, e.g. *Carpenters Pension Trust for Southern California v. Kronschnabel*, 632 F.2d at 748-749; *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983); *Eichelberger v. Eichelberger*, 584 F.Supp. 899, 900 (S.D. Tex. 1984) ("Federal decisions generally have concluded against ERISA preemption of state law."); *In Re Marriage of Baker*, 204 Cal.App.3d 206, 251 Cal.Rptr. 126 (1988) (a post-REA case which reaches the same holding); and *Western Conference of Teamsters Pension Trust Fund v. Jones*, 646 F.Supp. 228 (N.D. Cal. 1986) ("[ERISA] does not preempt state community property laws affecting the distribution of pension benefits").

C. The REA Amendments To ERISA Do Not Preempt Community Property Principles In A Testamentary Context.

As discussed above, prior to the passage of REA, virtually all courts agreed that REA did not preempt the application of state law community property principles in pension benefits. The clear judicial consensus before REA was that neither ERISA's main preemption clause nor ERISA's anti-alienation provisions applied to the co-ownership rights (and the claims flowing from these rights) of the nonparticipant spouse in a community property jurisdiction.

REA amended ERISA in certain respects. Petitioner and the *amicus* briefs supporting Petitioner argue that REA's amendments compel the conclusion that ERISA now completely preempts state law community property claims to pension plan benefits.

As the following discussion will demonstrate, Petitioner's contentions lack merit. REA's amendments actually confirm the existence of community property rights in plan benefits in the divorce context. Further, REA's amendments do not even address, let alone repeal, the pre-REA law respecting the community property rights of a nonparticipant spouse in the testamentary context.

1. REA'S QDRO Provisions Do Not Preempt The Community Property Rights of A Predeceased Nonparticipant Spouse.

Despite the judicial consensus discussed above, Congress was concerned about the "divergence of opinion among courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension plan." S. Rep. No. 98-575, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong.

& Ad. News at 2565 (footnote omitted).[9] The judicial debate that Congress wished to settle in REA centered on the divorce arena only – no debate over testamentary rights of nonparticipant spouses in community property states had yet emerged.

In crafting a legislative solution to this multi-faceted problem regarding ERISA plans in the divorce context, Congress created the "qualified domestic relations order" ("QDRO"). The QDRO was created to settle, on a prospective basis, the debate over ERISA rights in the divorce context only. There is nothing in REA's legislative history to suggest that Congress, in creating the QDRO, also intended to legislate away by inference community property rights in the death context. Indeed, the legislative history suggests just the opposite – that REA was not intended to "define or restrict the marital property interest in retirement benefits as determined under state law." (Statement of Representative Erlenborn, 130 Cong. Rec. H875 (daily ed. Aug. 9, 1984)).

As enacted in REA, the QDRO is a mandatory uniform device to enforce rights to ERISA plan benefits in a divorce context, whether those rights arise in a common law jurisdiction or a community property jurisdiction. To avoid any uncertainty over the ERISA preemption issue, Congress understandably inserted the QDRO as an express statutory exception both in ERISA's main preemption clause (see 29 U.S.C. § 1144(b)(7)) and in ERISA's anti-alienation provision (see 29 U.S.C. § 1056(d)(3)).

In *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit concluded that the QDRO provisions of REA preempt (and therefore defeat) a nonparticipant spouse's claim to her community property share of ERISA plan benefits in the death context. Essentially, the *Ablamis* majority concluded that the QDRO was intended by Congress to "fully occupy the field" of recognizing a nonparticipant spouse's community property claims to ERISA plan benefits. Since, according to the *Ablamis* majority, a probate order cannot fit within the statutory definition of a QDRO, the probate order is necessarily preempted.

The Fifth Circuit in the instant case rejected the Ninth Circuit's reasoning in *Ablamis*, on the ground that the Ninth Circuit's preemption analysis "places too much emphasis on a broad interpretation of the spendthrift provision." *Boggs v. Boggs*, 82 F. 3d 90, 98 (5th Cir. 1996).

The Section supports the Fifth Circuit's position and believes that the Ninth Circuit's *Ablamis* decision is flawed. *Ablamis* took a very limited statutory exception, carefully crafted to serve a particular purpose in a particular context, and stretched it far beyond Congress' stated intentions. Neither the legislative history of REA nor the precise statutory language added by REA supports the *Ablamis* majority's conclusion that Congress intended to fully occupy the field of community property rights in the death context when it created the QDRO.

As amended by REA, 29 U.S.C. § 1144(b)(7) provides that the main preemption clause

> shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title)....

Section 1056(d)(3), in turn, provides that ERISA's anti-alienation provisions

> shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that [the anti-alienation provision] shall not apply if the order is determined to be a qualified domestic relations order. (Emphasis added).

In defining a "qualified domestic relations order," Congress clearly stated

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[9] The "divergence" of judicial opinion that worried Congress seems of doubtful existence. As support for its statement, the Senate Report cited only two cases: the Ninth Circuit's 1980 decision in the *Stone* case, which rejected ERISA preemption, and the district court's opinion in *Francis v. United Technology Corp.*, 458 F.Supp 84 (N.D. Cal. 1978), which ruled in favor of ERISA preemption. *Stone* was decided two years after the district court's decision in *Francis*; since the *Francis* court is inferior to the *Stone* court, *Stone* effectively overruled *Francis* and eliminated any "divergence" of judicial opinion regarding ERISA preemption of community property laws.

that it includes a divorce decree which relates to marital property rights of a nonparticipant spouse under a state's community property law. See 29 U.S.C. § 1056(d)(3)(B)(ii). [10]

In other words, the drafters of REA added to ERISA a statement that first expressly subjected all domestic relations orders (and only domestic relations orders) [11] dealing with ERISA plan benefits to ERISA's anti-alienation provisions, and then carved out the QDRO exception. This approach reveals that Congress found it necessary to expressly declare that all such divorce decrees were preempted by ERISA's anti-alienation provisions. The only logical explanation for the explicit declaration is that, before REA, all divorce decrees (such as those in the *Campa* and *Stone* cases that confirm a nonparticipant spouse's community property rights) were not considered by the courts to have been preempted by the anti-alienation provisions.

It follows that, before REA, in light of the judicial and Congressional acceptance of community property rights in ERISA plan benefits, a probate order confirming a nonparticipant spouse's community property rights was likewise not preempted by ERISA's anti-alienation provisions.

REA, of course, affirmatively changed the prior law with respect

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[10] This statutory language regarding a qualified domestic relations order's "recognition" of rights to plan benefits based on a "community property law" itself reveals Congress' acceptance of the principle that ERISA does not preempt a state's community property laws. This forthright statutory acknowledgment that ERISA and community property rights may co-exist largely negates the arguments advanced in the U.S. Department of Labor's *amicus* brief, since those arguments presuppose that, for sake of national uniformity, ERISA (even pre-REA ERISA) necessarily preempts all community property rights of nonparticipant spouses.

[11] The *Ablamis* majority argued that REA's QDRO provisions preempt community property rights in the testamentary context because a "probate order" cannot fit within the definition of a QDRO. The *Ablamis* majority's analysis fails. It turned the QDRO statute on its head in reaching its preemption conclusion. A more careful reading of the statute reveals that a probate order does not fit within the definition of a "domestic relations order" which REA now says are preempted. Thus, probate orders fall outside the scope of REA's newly added preemption rule. Had Congress intended to preempt probate orders recognizing community property rights, Congress would have included the words "probate order" in the opening clause of section 1056(d)(3)(A).

to divorce decrees. By express statutory language, those decrees are now preempted (unless they qualify as a QDRO). REA was utterly silent with respect to probate orders. Accordingly, the prior law still applies to those orders -- the prior law which recognized that ERISA (including its anti-alienation provisions) does not preempt state law community property rights in the testamentary context.

It is entirely possible that Congress may decide to legislate in this context as well. For example, Congress may choose to enact into ERISA a "terminable interest rule" (discussed in Section 2 below), pursuant to which a predeceasing nonparticipant spouse's community property interest would automatically terminate at her death. Or Congress may borrow a page from REA and create a "qualified probate order" to deal with and enforce (on a uniform nationwide basis) these community property rights in the death context. Or Congress may take some other approach altogether, or take no action at all.

But that, quite simply, is the point. Under current law, probate orders that recognize community property rights of the predeceased nonparticipant spouse are not preempted by ERISA. Any change in that law is properly left to Congress.

2. REA's Annuity Provisions Are Not Complete Federal Substitutes For State Community Property Law Principles.

In addition to creating the QDRO, REA added a regime of mandatory survivor annuity benefits in ERISA-regulated retirement plans. The legislative history behind REA reveals that these annuity provisions were intended to enhance the rights of surviving nonparticipant spouses in both common law and community property jurisdictions. The REA additions were not intended to curtail any existing rights that nonparticipant spouses in community property jurisdictions already possessed under state law.

Indeed, in several respects the annuity provisions of REA mirror the fundamental community property recognition of "marriage as an

economic partnership, and the substantial contribution to that partnership of spouses who work both inside and outside the home." S. Rep. No. 98-575, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547. Nevertheless, as noted earlier, REA's legislative history reveals that REA was not intended to "define or restrict the marital property interest in retirement benefits as determined under state law." (Statement of Representative Erlenborn, 130 Cong. Rec. H875 (daily ed. Aug. 9, 1984.)

In other words, by creating greater security through mandatory survivor annuities for nonparticipant surviving spouses, including those in community property jurisdictions, Congress intended to supplement, not supplant, their existing community property rights in their spouses' pension benefits.

a. The Background To REA's Mandatory Survivor Annuity Provisions.

As originally enacted, ERISA Section 205 (29 U.S.C. § 1055) did not require survivor's benefits for nonparticipant spouses in all cases. "Qualified joint and survivor annuities" were an elective form of benefit for retiring participants. Pre-retirement death benefits were also limited.[12]

Before REA, participants were free to choose elective forms of benefit payments at retirement, such as a single-life annuity, lump sum or installment payment options.[13]

Before REA, spousal consent was not required when the participant selected among the different forms of payment at retirement. As a result, "most participants have in the past elected out of the joint and survivor's form at retirement in favor of a single-life or another

[12] See Bruce, *Pension Claims: Rights and Obligations* (BNA 1988), Ch. 6, p. 256.

[13] Id. at p. 258.

annuity form with higher immediate benefit payments."[14]

Finally, before REA, the preretirement survivor's coverage required under ERISA failed to cover many "early" deaths. Congress found that this failure resulted in "inequitable treatment of participants ... who die before the normal [or qualified early] retirement age under the plan... [because] the participant's spouse [could] be entitled to no survivor's benefits under the plan even though the participant had accrued significant vested benefits before death." S. Rep. 98-575, at 12, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547, at 2557.

In summary, before REA a participant could elect without spousal consent a payment option which could severely limit or eliminate a spouse's continued benefits at the participant's death. It was against this factual and legal backdrop that Congress enacted REA to better protect the nonparticipant spouse.

b. The Lifetime and Testamentary Community Property Rights Of A Nonparticipant Spouse In Retirement Benefits.

In analyzing the effect of the REA amendments, it is critical to keep in mind that, under California community property laws, a married participant's accrued benefits in an ERISA-regulated retirement plan constitute the community property of both spouses, concurrently owned one-half by each spouse. *In re Marriage of Brown*, 15 Cal.3d 838, 126 Cal. Rptr. 633, (1976); *In re Marriage of Ames*, 59 Cal.App.3d 234 ,130 Cal. Rptr. 435 (1976). As noted earlier, ERISA-regulated retirement benefits are simply a form of deferred compensation. Regardless of the form or manner in which these benefits are paid during the participant spouse's lifetime (i.e., single-life annuity, joint and survivor annuity, or lump sum), each plan payment constitutes

[14] Id. at p. 270.

a community property asset of the parties, identical to any other type of employment earnings.

As discussed earlier, before REA the courts consistently recognized the community property character of ERISA-regulated retirement benefits, although the issue most often arose in the divorce context. In *Campa, Stone* and the other cases discussed earlier, the courts upheld the community property rights of the nonparticipant spouse in ERISA plan benefits in the divorce context. REA did not eliminate the community property rights of the nonparticipant spouse upon divorce; it simply created the uniform QDRO device to enforce them (along with the rights to ERISA plan benefits of divorcing spouses in common law jurisdictions).

The only reported pre-REA case addressing ERISA-regulated retirement benefits in the death context likewise confirmed the community property rights of the nonparticipant spouse. In *Employee Savings Plan of Mobil Oil Corp. v. Geer, supra,* 535 F.Supp. 1052 (S.D.N.Y. 1982), the court addressed an issue arising under Texas community property law. In *Geer,* the deceased employee designated his wife as beneficiary for 50% of his plan benefits and his two children as beneficiaries for the other 50%. The wife argued that, under Texas community property law, she already owned one-half of the retirement funds and her husband could only properly dispose of the remaining half. The district court agreed, awarding her 75% of the funds and 12.5% to each of the two children.

The *Geer* court found that ERISA did not preempt the community property principles of Texas laws of succession and inheritance. Specifically, the court used the *Stone* "tangential relation" and the "remote touching" test as set forth in *American Telephone and Telegraph Company v. Merry*, 592 F.2d 118 (2nd Cir. 1979), and found that "[a]lthough this state law has an impact on the distribution of assets.... this impact [is] the kind of remote touching that the *Merry* court excluded from the meaning of 'relating to.'" Id. at 1054.

The *Geer* court concluded:

> ". . . [T]he question here is whether Congress intended complete cancellation of the state's traditional property rights ... [T]he Court finds that Congress did not intend to preempt community property laws to the extent that they require the distribution claimed in this case.
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> Although the Act provides a method for the participant to designate a beneficiary, this procedure appears to be another provision for the protection of the employee in his relations with his employer and not a federal decision to upset the balance of spousal rights protected by state law. Id. at 1055 (emphasis added).

Before the enactment of REA, the testamentary rights of the nonparticipant spouse to pension benefits in California was in a state of flux, due to an ongoing struggle with the so-called "terminable interest rule." The terminable interest rule was first created by the California Supreme Court in 1963.[15]

The terminable interest rule was finally legislatively abolished in 1986, two years after Congress enacted REA. The California Legislature enacted former California Civil Code section 4800.8 (now California

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[15] The California Supreme Court created the terminable interest rule in *Benson v. City of Los Angeles,* 60 Cal.2d 355, 33 Cal.Rptr. 257, (1963), and expanded it nine years later in *Waite v. Waite,* 6 Cal.3d 461, 99 Cal.Rptr. 325, (1972). One of the aspects of this judicially created principle was that the nonparticipant's community property rights in the participant's retirement benefits (whether privately or publicly funded) terminated at the nonparticipant's death. Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine,* 14 Sw. U.L. Rev. 613, 616 (1984) reprinted as *Toward Pension Equality: A 'Death Blow" to California's Terminable Interest Doctrine,* 12 Comm. Prop. J. 199 (1985).

Both before and during the time Congress was considering the REA amendments, the California terminable interest rule was coming under increased attack. See *In Re Marriage of Peterson,* 41 Cal.App.3d 642, 15 Cal.Rptr. 184, (1974). In *Chirmside v. Board of Administration,* 143 Cal.App.3d 205, 191 Cal.Rptr. 605, (1983), the court refused to apply the rule to community property contributions in a fully vested public retirement plan. In *Bowman v. Bowman,* 171 Cal.App.3d 148, 217 Cal.Rptr. 174, (1985), the court declined to apply it in the context of a private pension plan. See also *Western Conference of Teamsters Pension Trust Fund v. Jones,* 646 F.Supp. 228, 232-33 (N.D. Cal. 1986).

Family Code section 2610) which specifically dealt with the rule in a divorce context. The legislative history nevertheless reveals, and subsequent case law confirms, that the rule was also abolished in the death context. See *Estate of MacDonald*, 51 Cal.3d 262, 272 Cal.Rptr. 153, 794 P.2d 911 (Cal. 1990).[16]

In short, during the time that Congress was formulating its legislative solutions in REA to protect the surviving nonparticipant spouse, the rights of the predeceased nonparticipant spouse in California were the subject of a game of judicial tug-of-war. The intense struggle being played out in the California courts escaped the Congress' attention in REA; the aftermath of that struggle -- the abolition of the terminable interest rule and the vindication of the nonparticipant spouse's testamentary rights over community property pension benefits -- faced the Ninth Circuit in *Ablamis*. Unfortunately, that court reached the wrong conclusion. The opportunity to properly interpret what REA did and did not do is now before the Court.

c. REA's Mandatory Annuity And Spousal Consent Provisions.

The REA amendments to ERISA were designed to address Congress' concern over ERISA's failure to assure death benefits for surviving nonparticipant spouses. REA dealt with this failure by addressing two specific circumstances: (1) the participant's post-retirement death, and (2) the participant's pre-retirement death. Notably, nowhere in the legislative history of REA nor in the amended statutory language does Congress even refer to, let alone specifically deal with,

[16] Both before and after REA's enactment, two supreme courts from other community property jurisdictions expressly declined to adopt California's terminable interest rule and upheld the inheritability of a deceased nonparticipant spouse's community property share of pension benefits. See *Farver v. Department of Retirement Systems*, 97 Wash.2d 344, 644 P.2d 1149 (1982) (dealing with state-funded benefits); *Allard v. Frech*, 31 T. Sup. J. 371, 754 S.W.2d 111 (Texas 1988) (dealing with ERISA plan benefits).

the rights of a predeceasing nonparticipant spouse in a community property jurisdiction.

For post-retirement deaths of participants, REA reinvigorated ERISA's original mandate that benefits be provided in the qualified joint and survivor annuity form, by requiring "spousal consent when[ever] a participant elects not to take a survivor benefit." S. Rep. No. 98-575, at 12 (1984), *reprinted in* 1984 U.S. G.C.A.N. News 2547, 2558. [17]

Regarding pre-retirement deaths of participants, the survivor annuity rules created by REA are complex. Generally, under the REA amendments, a preretirement survivor annuity is now required under all pension plans whenever a deceased participant has a nonforfeitable right to benefits. A plan may no longer forego such survivor benefits.

The rules regarding the amount of the "qualified preretirement survivor annuity" created by REA are even more complex. They differ depending on whether the plan is a defined benefit plan or a defined contribution plan. See 26 C.F.R. § 1.401(a)-20 (Q&A-18 (QPSA for defined benefit plan) and Q&A-20 (QPSA for defined contribution plan)).

Although REA in many respects made the surviving nonparticipant spouse the mandatory beneficiary of the participant's pension benefits, certain exceptions remained.

[17] As explained in one treatise:

> "With the spouse's consent, a participant may still elect to take benefits in a single-life form to avoid an actuarial reduction, or he or she may elect not to take preretirement coverage to avoid a small actuarial charge, but presumably fewer will do so with the new spousal consent requirements."

Bruce, *Pension Claims: Rights And Obligations*, supra at p. 270.

REA's qualified joint and survivor annuity mandate does have one exception. 29 U.S.C. § 1055, as amended, provides that a joint and survivor annuity need not be offered under a profit-sharing or stock bonus plan if the plan provides that any undistributed nonforfeitable account balance at death will be paid to the participant's spouse (unless, again, the spouse consents to a different beneficiary). ERISA § 205(b)(1)(C)(i), as amended (29 U.S.C. § 1055(b)(1)(C)(i)).

First, for defined benefit plans, REA's survivor annuity requirements

> apply only to benefits in which a participant was vested immediately prior to death. They do not apply to benefits to which a participant's beneficiary becomes entitled by reason of death or to the proceeds of a life insurance contract to the extent such proceeds exceed the present value of the participant's nonforfeitable benefits that existed immediately prior to death.

26 C.F.R. § 1.401(a)-20 (Q&A-12(a)) (emphasis added).

Second, for certain defined contribution plans, REA's survivor annuity requirements only apply to 50% of the nonforfeitable account balance of the participant as of the date of the participant's death. 26 C.F.R. § 1.401(a)-20 (Q&A-20).

In short, even after REA, a participant retains testamentary control over a certain portion of the death benefits available under his or her plan. In post-REA cases arising from common law jurisdictions, courts have recognized and upheld the participant's right to exercise this testamentary control over the non-REA-affected death benefits. See *Art Builders Profit Sharing Plan v. Bosely*, 649 F.Supp. 848, (D. Md. 1986); *Naddeo v. Officers and Employees Pension Plan*, 637 F.Supp. 82 (E.D. Pa. 1986). Although *Geer* predated REA, its holding would likewise suggest that, in a community property jurisdiction, the participant's testamentary control over the non-REA-affected death benefits is limited to his or her one-half community property interest in those benefits. The balance belongs to the surviving spouse, either as owner with respect to the other half of the non-REA-affected benefits, or as the REA-mandated beneficiary with respect to the REA-affected benefits.

d. The Ninth Circuit's Insertion, Through Judicial Legislation, Of The Terminable Interest Rule Into ERISA.

In *Ablamis v. Roper, supra*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit Court, based almost exclusively on an analysis of ERISA's anti-alienation provision and REA's QDRO exception to that provision, concluded that Congress intended to create its own "terminable interest rule" when it enacted REA. The *Ablamis* court also suggested that REA's survivor annuity provisions were intended by Congress to limit the nonparticipant spouse's right to receive (or control) her community property share of the plan benefits. Id. at 1453-54.

The Section submits that the Ninth Circuit's *Ablamis* decision is flawed. Simply put, the QDRO provisions added by REA --which the *Ablamis* court itself acknowledged deal only with the divorce context -- cannot be fairly read as Congress' considered enactment into ERISA of the much-criticized terminable interest rule in the death context.

REA's survivor annuity provisions likewise provide no basis for a federal terminable interest rule affecting the nonparticipant's preexisting community property rights. REA's survivor annuity provisions concern themselves only with the participant's post-retirement death and pre-retirement death. These provisions simply do not address in any fashion the community property ownership issues (including testamentary control issues) which arise if the nonparticipant spouse in a community property jurisdiction dies first. Properly analyzed, the legislative history behind REA evidences that Congress, at best, intended simply to enhance the rights of surviving nonparticipant spouses (in both common law and community property jurisdictions) and, at worst, failed to consider, let alone address, issues arising from the existing testamentary rights of the predeceased spouse in community property jurisdictions.

The *Ablamis* majority, apparently uncomfortable with the perceived gap in the statutory scheme resulting from the REA amendments to ERISA, took it upon itself to fill that gap by judicially

legislating the terminable interest rule into ERISA. The *Ablamis* majority impliedly admits that it has judicially legislated what it perceived to be a fair solution to fill the gap left by Congress' REA amendments, when it states:

> Were the statute to be amended to provide equal benefits to the employee and non-employee spouse, Congress would have to consider two alternatives: permitting both spouses to bequeath a portion of the pension benefits, and prohibiting both spouses from doing so - at least without the consent of the other. Were Congress to adhere to its objective of seeking to ensure the financial well-being of retired employees and their spouses, it would in all likelihood choose the latter option.

Id. at 1457 n. 12 (Emphasis added).[18]

As the dissent in *Ablamis* pointed out, "[t]he majority seems to miss the question to be answered." *Id.* at 1466 n. 2 (Fletcher, Circuit Judge, dissenting). The question is not what Congress would do if it addressed the issue (which it has not), but whether ERISA, as amended by REA, "positively requires" by "direct enactment" the federal

[18] The majority opinion in *Ablamis* was presaged by the dissenting opinion in *Allard v. Frech, supra*, 754 S.W.2d at 116-20 (Spears, Justice, dissenting). The *Allard* dissent also argued for ERISA preemption to defeat the claims of the nonparticipant spouse's heirs. In contrast to the quiet approach of the *Ablamis* majority, however, the *Allard* dissent openly championed the judicial enactment of the terminable interest rule in ERISA to combat "the unfairness inherent in divesting an employee of hard-earned retirement benefits and diverting these benefits to healthy young adults capable of self support." 754 S.W.2d at 118. While the Section can appreciate these concerns over perceived inequities, the Section notes that there can also be "patent inequity" in stripping the nonparticipant spouse of her share of a valuable asset which she may desperately wish to leave to her dependents. (It must also be noted that, even without a terminable interest rule, the nonparticipant spouse is free to bequeath her share of the pension benefits to the participant, if that is her wish.) In any event, this debate simply underscores that the legislature, not the courts, is the proper forum for addressing this issue, since all the opposing viewpoints can be aired and considered in crafting the appropriate resolution.

preemption of the predeceased nonparticipant spouse's existing community property rights. The *Ablamis* dissent likewise correctly concludes that these fundamental prerequisites for federal preemption of state law marital property rights are missing from the REA amendments, and that REA's survivor annuity provisions "certainly cannot be read as creating the testamentary disenfranchisement of a predeceasing spouse." Id.

A decision either affirming or reversing the *Boggs* decision may result in some perceived inequities, given the somewhat flawed and imperfect statutory scheme resulting from the REA amendments to ERISA.[19] Nevertheless, the Court should not insert its own legislative judgment into the apparent gap in ERISA's complex and comprehensive regulatory scheme. Based on the statutes as enacted and well-established judicial precedent, the existing testamentary rights of a predeceased nonparticipant spouse afforded under state community property law in ERISA-regulated retirement benefits should be recognized and upheld. Any other resolution – to correct, for example, any perceived imbalances in the spouses' lifetime or testamentary pension rights under state community property law – must be left to Congress.

D. Post-REA Legislation Reflects Congress' Awareness That A Predeceased Nonparticipant Spouse Has Testamentary Ownership And Control Over Her Share Of The Participant's Pension Benefits.

Internal Revenue Code (IRC) § 2039(c), 26 U.S.C. § 2039(c) provided an express federal estate tax exclusion for the community property interest of a nonparticipant spouse in qualified pension plan benefits. The Tax Reform Act of 1986 (Pub. L. No. 99-514, section 1852(e)) repealed IRC § 2039(c). As a result of that repeal, a

[19] A chart comparing the different lifetime and post-death distribution schemes that result from the Ninth Circuit's *Ablamis* approach and the Fifth Circuit's *Boggs* approach is set forth in the Appendix to this *amicus curiae* brief.

predeceased nonparticipant spouse's gross taxable estate now includes the value of any community property interest that he or she has in the participant's qualified plan. The Senate Finance Committee Report for the bill stated:

> Under the bill, the special community property rules applicable to qualified plans for purposes of the estate and gift tax provisions are repealed. However, the bill clarifies that if a transfer is made to an employee spouse by a nonemployee spouse in a community property state, the amount transferred is eligible for the unlimited marital deduction. (Emphasis added).

S. Rep. No. 99-313.

Although Congress did not enact the promised clarification that the amount transferred by the nonemployee spouse to the employee spouse will qualify for the marital deduction, the Report is significant for several reasons. First, the Report states unambiguously that a nonemployee spouse in a community property state has a taxable property interest which is transferable at death. Second, it acknowledges that a transfer could be made by the nonparticipant spouse to a person other than the participant spouse.

In short, Congress' action in repealing the IRC § 2039(c) exclusion in 1986, two years after REA's enactment, clearly evidences Congress' awareness of a nonparticipant spouse's testamentary ownership and control over his or her community property share of pension benefits. This legislative action makes no sense if the REA amendments to ERISA had earlier eliminated those very same testamentary rights.

II. THERE IS NO FEDERAL PREEMPTION OF COMMUNITY PROPERTY INTERESTS IN INDIVIDUAL RETIREMENT ACCOUNTS

An individual retirement account ("IRA") is a self-settled trust governed by section 408 of the Internal Revenue Code, 26 U.S.C. § 408. An IRA is not an employee benefit plan subject to the preemption

provisions applicable to Titles I and IV of ERISA. See Department of Labor Reg. § 2510.3-3(b). An IRA is also not subject to the anti-alienation provisions applicable to ERISA plans. See 29 U.S.C. § 1051(b) [excepting IRAs from, inter alia, the anti-alienation provisions in section 1056.][20]

Recognizing that ERISA provides no basis for preemption, Petitioner nevertheless argues for federal preemption of community property rights in IRAs based on IRC section 408(g), which reads: "This section [408] shall be applied without regard to any community property laws." Petitioner's contention lacks merit and must be rejected.

The purpose of subsection (g) of IRC section 408 is quite straightforward. Under IRC section 408, a taxpayer is entitled to an income tax deduction, based on his or her "earned income," for deposits into an IRA. To ensure uniformity in the calculation of those deductions, subsection (g) makes it clear that the taxable income of the wage-earner in a community property jurisdiction is not divided in half for purposes of computing his or her permissible IRA deduction.

Aside from this straightforward meaning and purpose of subsection (g), Petitioner's contention that this modest provision in the Internal Revenue Code was intended to preempt state community property rights in IRAs has absolutely no support in any legislative history, administrative rulings, or case law. Indeed, all such authority clearly recognizes community property rights in IRAs, including those rights in the death context. See *Estate Of MacDonald*, *supra*, 51 Cal. 3d 262, 272 Cal. Rptr. 153 (1990); *Estate of Mundell*, 857 P. 2d 631, 124 Idaho 152 (1993).

The Internal Revenue Service has itself acknowledged that subsection (g) of IRC section 408 does not preempt community property

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[20] Section 408(e)(4) of the Internal Revenue Code (26 U.S.C. § 408(e)(4)) expressly permits an IRA to be used as security for a loan.

rights in IRAs. In Private Letter Ruling 8040101,[21] the Service upheld the testamentary transfer of a wife's community property interest in her husband's IRA. The Service stated:

> As a general rule, the death of one spouse in a community property state has the same effect on the community as a divorce decree. Upon either death or divorce, the community is terminated and a division of the community property usually occurs. It would follow that a similar result should be reached whether the community is ended by divorce or death.
>
> Because there is no specific language on what effect Congress intended section 408(g) to have, and because of the general rule of statutory construction which provides that federal statutes are construed as to not preempt State law unless that was the clear and manifest intent of Congress, we conclude that section 408(g) does not abrogate any substantive rights under State law.

There is simply no support for Petitioner's argument calling for federal preemption of state law community property rights in IRAs. Indeed, given the self-funded nature of IRAs which must be in the employed spouse's name, a finding of federal preemption would utterly destroy the non-employed spouse's rightful community property claim to the money deposited in the employed spouse's IRA. That result would make absolutely no sense as a matter of law or policy.

Given the precise language and straightforward purpose of subsection (g) of IRC section 408 and the existing authorities, the Court should reject Petitioner's argument and rule that there is no federal preemption of state law community property interests in IRAs.

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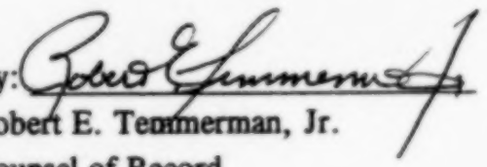
[21] Internal Revenue Code section 6110(j)(3) [26 U.S.C. § 6110(j)(3)] provides that private letter rulings may not be used as precedent. However, this Court has used such rulings as evidence of the Service's position. See *Rowan Companies, Inc. v. U.S.*, 452 U.S. 247 (1981). It is for that limited purpose that the Section discusses Priv. Ltr. Rul. 8040101.

CONCLUSION

State community property law recognizes that a deceased nonparticipant spouse, as one-half of an economic partnership with her spouse, has a current and equal ownership interest in her community property share of retirement plan benefits. The recognition of this ownership interest is fundamentally important, especially in this day and age where significant family wealth is concentrated in such plans. Although Congress may choose to impose its own legislative judgment in the arena of community property rights in this testamentary context, it has not yet done so. For all of the foregoing reasons, the Section urges the Court to rule that ERISA, as amended by REA, does not preempt state community property law principles and does not deprive a nonparticipant spouse of testamentary control over her community property share of the benefits.

Dated: December 30, 1996

Respectfully Submitted,
ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA

By: 
Robert E. Temmerman, Jr.
Counsel of Record

APPENDIX

COMPARISON OF LIFETIME AND POST-DEATH DISTRIBUTION SCHEMES UNDER *ABLAMIS* AND *BOGGS* ASSUMING NO WAIVER OF QPSA AND QJSA

Legend

P	=	Participant spouse
NPS	=	Nonparticipant spouse
QPSA	=	Qualified preretirement survivor annuity
QJSA	=	Qualified joint and survivor annuity
DOD	=	Date of death
CP	=	Community property

	ABLAMIS		BOGGS	
Pre-Retirement	**Defined Benefit and Money Purchase Plan**	**Profit-Sharing and Stock Bonus Plan**	**Defined Benefit and Money Purchase Plan**	**Profit-Sharing and Stock Bonus Plan**
P dies first, before P has retired.	NPS receives 100% of vested plan benefits thru QPSA -- amount and timing of receipt depends on whether P died before or after reaching earliest retirement age in the plan. P can designate (without NPS's consent) beneficiary for vested plan benefits (if any) that exceed the value of the QPSA. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	NPS receives 50% of vested account balance thru QPSA (or 100% of vested account balance if plan so provides, in lieu of QPSA). P can designate (without NPS's consent) the beneficiary for other vested account balance.	NPS receives 100% of vested plan benefits thru QPSA -- amount and timing of receipt depends on whether P died before or after reaching earliest retirement age in the plan. P and NPS each own and control 50% of any other benefits provided by plan.	NPS receives 75% of vested account balance -- NPS's 50% CP share of account balance and 25% of account balance thru QPSA (50% x P's 50% CP share of account balance). P can designate (without NPS's consent) the beneficiary for other 25% of account balance.

Pre-Retirement	ABLAMIS		BOGGS	
	Defined Benefit and Money Purchase Plan	Profit-Sharing and Stock Bonus Plan	Defined Benefit and Money Purchase Pension Plan	Profit-Sharing and Stock-Bonus Plan
NPS dies first, before P has retired	P owns 100% of all plan benefits and can exercise complete lifetime and testamentary control over them.	P owns 100% of account balance and can exercise complete lifetime and testamentary control over it.	NPS's estate owns and controls 50% of all accrued benefits as of NPS's DOD. P owns and controls balance of accrued benefits (including 100% of accruals after NPS's death).	NPS's estate owns and controls 50% of account balance as of NPS's DOD. P owns and controls the balance of P's account (including 100% of accruals after NPS's DOD).

Post-Retirement	ABLAMIS		BOGGS	
	Defined Benefit and Money Purchase Plan	Profit-Sharing and Stock Bonus Plan	Defined Benefit and Money Purchase Pension Plan	Profit-Sharing and Stock-Bonus Plan
P dies first, after P has retired.	NPS receives 100% of vested plan benefits thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	NPS receives 100% of vested account balance thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement.	NPS receives 100% of vested plan benefits thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement. P and NPS each own and control 50% of any other death benefits provided by plan.	NPS receives 100% of vested account balance thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement.
NPS dies first, after P has retired	P owns and controls 100% of QJSA joint annuity payment. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	P owns and control 100% of QJSA joint annuity payment. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	P owns and controls 50% of QJSA joint annuity payment and NPS's estate owns and controls 50% of QJSA joint annuity payment.	P owns and control 50% of QJSA joint annuity payment and NPS's estate owns and controls 50% of QJSA joint annuity payment.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1996, three (3) true and correct copies of the foregoing **Motion for Leave to File *Amicus Curiae* Brief in Support of Respondents** and **Brief of the Estate Planning, Trust and Probate Law Section of the State Bar of California as *Amicus Curiae* in Support of Respondents** were transmitted by UPS Next Day Air to each counsel at the addresses set forth below:

Marian Mysing Livaudais
3500 Highway 190, Suite 200
Mandeville, LA 70448

James F. Willeford
201 St. Charles Avenue
Suite 3907
New Orleans, LA 70170

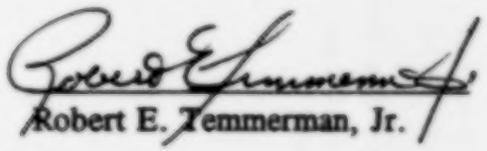
Thomas F. Boggs
Rte. 4, Box 229
West Lake
Monroe, LA 71203

Guy L. Deano, Jr.
895 Park Avenue
Mandeville, LA 70448

Walter Dellinger
Acting Solicitor General
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Daniel B. Stone
Ivins, Phillips & Barker
1700 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20006

Mary Ellen Signorille
American Association of Retired Persons
601 E. Street, N.W.
Washington, D.C. 20049



Robert E. Temmerman, Jr.